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Decision

Matter of: Lion Vallen, Inc.

File: B-418503; B-418503.2

Date: May 29, 2020

Francis E. Purcell, Jr., Esq., and Joseph R. Berger, Esq., Thompson Hine LLP, for the protester.

Ellen Brandau Clark, Esq., and Robert J. Drone, Esq., United States Marine Corps, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's response to prior disclosures of the protester's proprietary information is denied where the agency reasonably amended the solicitation to mitigate the competitive harm to the protester.
 2. Protest that the agency did not adequately investigate a potential Procurement Integrity Act violation is denied where the agency reasonably concluded that no violation occurred because there was not a knowing disclosure of information by the agency.
 3. Protest that a solicitation fails to address an organizational conflict of interest is denied where the agency reasonably addressed the potential conflict.
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DECISION

Lion Vallen, Inc. (LVI), of Dayton, Ohio, protests the terms of request for proposals (RFP) No. M67004-20-R-0012, which was issued by the United States Marine Corps for operational management and equipment readiness support services. LVI argues that the Marine Corps improperly disclosed its proprietary information and that the current RFP does not adequately mitigate the competitive disadvantage to the protester stemming from the disclosures. The protester also argues that the agency failed to conduct a reasonable investigation of whether the disclosure violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C.

§§ 2101-2107, known as the Procurement Integrity Act (PIA), and that the RFP does not adequately address organizational conflicts of interest (OCIs).

We deny the protest.

BACKGROUND

This procurement concerns the Marine Corps's Consolidated Storage Program (CSP), which provides the Marine Corps with operational management and equipment readiness for Marines going to or from combat areas or training exercises. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2.¹ The CSP program provides a "single access point" for worldwide distribution of equipment to Marines. *Id.* The contractor will be required to provide the following services for clothing and equipment: "item management, accountability, Total Asset Visibility. . . , warehousing, laundry and repair, inventory management and lifecycle management of equipment (including disposal)." Agency Report (AR), Tab 1, 2020 RFP at 21.²

The agency describes the CSP as "a mature agency requirement" that has been the subject of numerous competitive procurements. COS/MOL at 2. LVI was awarded a contract for the CSP requirements in December 2000, and was the incumbent contractor until September 2017. *Id.* Since that time, LVI has been a subcontractor to the current incumbent contractor, PrimeTech International, Inc. *Id.*

The Marine Corps issued RFP No. M67004-19-R-0004 (2019 RFP) for the CSP requirements on May 29, 2019. AR, Tab 2, 2019 RFP at 1. Prior to the issuance of the 2019 RFP, the Marine Corps issued a request for information (RFI) in June 2018 for market research. Protest at 11. As discussed below, the agency acknowledges that LVI proprietary information was included in the RFI. COS/MOL at 7-8. LVI notified the agency of concerns associated with the disclosure, and the agency agreed that it would modify the acquisition strategy for the requirement when the 2019 RFP was issued. *Id.*

The 2019 RFP anticipated the award of a contract with fixed-price, cost-reimbursement, and time-and-materials (T&M) requirements, for a base period of 1 year, two 1-year options, and one 6-month option. 2019 RFP at 21. The RFP advised offerors that proposals would be evaluated based on the following four factors: (1) technical; (2) past performance; (3) small business participation and subcontracting, which was to be

¹ The statement of facts in the COS/MOL was prepared by the chief of the contracting office for the Marine Corps Logistics Command at Albany, Georgia. COS/MOL at 1. This individual is the "senior supervisor of all the agency's Contracting Officers." *Id.* at 2. The agency assigned different contracting officers for the 2019 and 2020 versions of the RFP. *Id.* at 2.

² References to the 2020 RFP are to the conformed version through amendment 002 of the solicitation challenged here; references to the 2019 RFP are to the previous version of the RFP.

evaluated on an acceptable/unacceptable basis; and (4) price. *Id.* at 128. With respect to pricing, the RFP included attachment 22, which was a Microsoft Excel spreadsheet with two tabs; one tab required offerors to propose prices for the fixed-price contract line item numbers (CLINs) and the other tab identified the three labor categories that offerors were to use to price the T&M CLINs. 2019 RFP, attach. 22. For purposes of award, the technical and past performance factors, when combined, were “significantly more important” than price. *Id.*

The Marine Corps received proposals by the closing date of August 9. COS/MOL at 3. The agency concluded that “all submitted and evaluated 2019 proposals had issues that precluded agency award without discussions.” *Id.* On Friday, November 15, the agency transmitted discussion letters to offerors whose proposals were included in the competitive range, including LVI. *Id.* The agency states that it intended to conduct oral discussions with offerors based on the letters. *Id.*

On Monday, November 18, the agency’s contract specialist who transmitted the letters discovered that she had sent the letter intended for LVI to both LVI and another offeror (Offeror 2). *Id.* The contract specialist stated that she “must have named the agency Discussion Letter meant for LVI as a PDF file with the name of another offeror, then she saved it under that other offeror’s name by mistake.” *Id.* This letter identified LVI’s proposed price as well as other concerns with LVI’s proposal. AR, Tab 3, LVI Discussions Letter at 2.

The same day, the contract specialist notified the contracting officer for the 2019 RFP of the inadvertent disclosure. COS/MOL at 3. The contracting officer and contract specialist notified the chief of the contracting office of the disclosure on November 18; this individual, in turn, notified the head of the contracting activity. *Id.* On November 19, the agency advised all offerors that discussions were canceled until further notice. *Id.*

Also on November 18, the contract specialist contacted Offeror 2 via phone and email to advise that it had received the wrong letter, and to instruct Offeror 2 to destroy that letter. *Id.*; AR, Tab 6, Email from Contract Specialist to Offeror 2, Nov. 18, 2019 (4:42 pm), at 2. Offeror 2 replied that day to confirm that it had destroyed the letter and to inquire whether its letter had been provided to other offerors. AR, Tab 6, Email from Offeror 2 to Contract Specialist, Nov. 18, 2019 (5:30 pm), at 1. The contract specialist advised that Offeror 2’s letter had not been provided to any other offeror. *Id.*, Email from Contract Specialist to Offeror 2, Nov. 20, 2019 (12:20 pm), at 1.

The contracting officer concluded that the provisions of the PIA and Federal Acquisition Regulation (FAR) subpart 3.1 required him to determine whether the disclosure “had any impact on the pending award or selection of a contractor.” COS/MOL at 3. On November 19, the contracting officer signed a determination and findings memorandum (D&F) addressing the disclosure. AR, Tab 7, D&F at 1. The contracting officer interviewed the contract specialist and the chief of operational contract support (OCS) concerning the mistaken transmission. COS/MOL at 4; see AR, Tab 7, D&F at 1.

As relevant here, the chief of OCS advised that he was with the contract specialist at the time she transmitted the discussion letters via email, and explained that the contract specialist had to rename the files after receiving them from the contracting officer. COS/MOL at 4. The chief of OCS states that he believes the error took place during this renaming process. *Id.* The contracting officer characterized the error in transmitting the letter to Offeror 2 as inadvertent. AR, Tab 7, D&F at 1. The D&F states that the contracting officer “determine[d] that an offeror’s price and other source selection information was transferred to a competing offeror, and that disclosure incurably affects the source selection process for this CSP procurement effort.” *Id.* at 2. Based on this finding, the contracting officer recommended cancelling the procurement. *Id.*

After signing the D&F, the contracting officer discussed the agency’s options for proceeding with the head of the contracting activity and other agency officials. COS/MOL at 4-5. As discussed below, the agency states that in addition to the concerns regarding the disclosure of LVI’s information, it concluded that the 2019 RFP was not in compliance with guidance issued, after the publication of the RFP, by the Commandant of the Marine Corps concerning inventory management. *Id.* at 5. The agency therefore cancelled the 2019 RFP on November 25. AR, Tab 9, Agency Cancellation Notice, Nov. 25, 2019, at 1.

The Marine Corps notified LVI on January 23, 2020, of the “inadvertent disclosure” of its discussions letter to another offeror, prior to the cancellation of the 2019 RFP. Protest, attach. 1, Letter from Agency to LVI, Jan. 23, 2020, at 1. The agency advised that “[t]he release of information and a simultaneous change in the requirement resulted in the decision to cancel” the 2019 RFP. *Id.*

The agency issued the 2020 RFP on January 30. 2020 RFP at 1. The revised solicitation contains new performance work statement (PWS) provisions that incorporate changes to inventory management as required by the Commandant of the Marine Corps memorandum. 2020 RFP, PWS at 41-43 ¶¶ 3.3.5-3.3.5.14. The period of performance was revised to a base period of 8 months, with two 1-year options and one 6-month option. 2020 RFP at 22. Additionally, the RFP revised the portion of attachment 22 which identified the labor categories that offerors were required to use to price the T&M CLINs. *Id.*, attach. 22, Tab 1. The evaluation factors and basis for award remained the same as the 2019 RFP. 2020 RFP at 124. The revised due date for proposals was March 26. *Id.* at 1.

Counsel for LVI contacted the Marine Corps on January 31 to express concern about the release of its information in the discussions letter and to request that the agency require offerors to certify that “no offeror has accessed or possesses any LVI proprietary information.” AR, Tab 13, Letter from Counsel for LVI to Agency, Jan. 31, 2020, at 5-6. Counsel for LVI also contacted the Marine Corps on February 7, after the issuance of the 2020 RFP, to express concern about the revised labor categories in RFP attachment 22. Protest, attach. 7, Letter from Counsel for LVI to Agency, Feb. 7, 2020, at 2-3.

On February 12, 2020, the agency responded to LVI's letters, stating that the agency "regret[s] that an inadvertent release of Procurement Integrity Act (PIA) information occurred" in connection with the 2019 RFP, and that the agency "investigated and took appropriate remedial action to alleviate any unfair competitive advantage with the Consolidated Storage Program (CSP) requirement." Protest, attach. 3, Letter from Agency to Protester, Feb. 12, 2020, at 1. The agency advised that because there was not a "knowing disclosure" of LVI's information, the agency concluded that there had not been a violation of the PIA. *Id.* The agency also stated that the revisions to the T&M labor categories in attachment 22 were based on "the Agency's records [and] not from LVI's proposal submitted in 2019." *Id.* at 2. In addition to this letter, the agency amended the 2020 RFP on February 13 to include the following requirement: "All offers shall certify that they did not rely on any proprietary information, other than their own proprietary information in developing their proposal. This statement shall be incorporated in Binder V, Contract Documentation." AR, Tab 14, 2020 RFP, amend. 0001 at 5. This protest followed.

DISCUSSION

LVI raises three primary challenges to the terms of the solicitation: (1) the agency improperly disclosed the protester's proprietary information on three occasions and failed to adequately mitigate the competitive disadvantage from the disclosures; (2) the agency improperly concluded that the disclosures of its information did not constitute a violation of the PIA; and (3) the agency unreasonably failed to include provisions in the RFP to address what the protester contends is an OCI arising from the potential hiring of employees of firms who were identified as having conflicts. For the reasons discussed below, we find no basis to sustain any of the protester's arguments.³

Competitive Disadvantage from Disclosures

LVI argues that the Marine Corps improperly disclosed its proprietary information to Offeror 2 during discussions in connection with the competition under the 2019 RFP, and also improperly released LVI proprietary information to all offerors in attachment 22 to the 2020 RFP. The protester additionally argues that the agency improperly disclosed its proprietary information in connection with a 2018 RFI associated with the 2019 RFP, and that the agency did not adequately mitigate that harm. For the reasons discussed below, we find no basis to sustain the protest.

The disclosure of proprietary or source selection information to an unauthorized person during the course of a procurement is improper. 41 U.S.C. § 2102; FAR 3.104; *S&K Aerospace, LLC*, B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 at 8. Where an agency inadvertently discloses an offeror's proprietary information, the agency may choose to cancel the procurement if it reasonably determines that the disclosure harmed the

³ LVI also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

integrity of the procurement process. *Kemron Env'tl. Servs., Inc.*, B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2. Where an agency chooses not to cancel the procurement after such a disclosure, we will sustain a protest based on the improper disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure. *Gentex Corp.--Western Operations*, B-291793, *et al.*, Mar. 25, 2003, 2003 CPD ¶ 66 at 8-9. Where an agency modifies the terms of the solicitation to address an unfair competitive advantage or disadvantage, we will review whether the agency reasonably found that the revised terms mitigated the concern. *S&K Aerospace, LLC*, *supra* at 8-10.

Release of LVI's Discussions Letter

LVI argues that the Marine Corps's disclosure of its discussions letter to Offeror 2 in connection with the 2019 RFP resulted in competitive prejudice. The protester further argues that the agency's modification of the terms of the solicitation through the issuance of the 2020 RFP did not mitigate this competitive harm.

As discussed above, the Marine Corps sent the discussions letter intended for LVI to Offeror 2, which identified four issues for the protester to address. AR, Tab 3, LVI Discussions Letter at 2. First, the letter stated that the protester's proposal was assigned two deficiencies under the technical evaluation factor because [DELETED] proposed [DELETED] did not meet the experience requirements of the PWS. *Id.* Second, the protester's proposal reflected "subcontracting plan past performance falling short of the 24.5% goal" on two contracts. *Id.* Third, the letter advised that certain pages of the protester's technical proposal did not meet the RFP's font requirement. *Id.* The agency instructed the protester to revise the font size, but also cautioned it "to comply with [the] resume page count limit as well as the overall proposal page count limit." *Id.* Finally, the letter identified the protester's proposed price and stated: "This is a highly competitive procurement and the offeror should ensure that its firm's best offer is submitted." *Id.*

With regard to the non-price issues cited in the discussions letter, the Marine Corps argues that the information could not reasonably confer a competitive advantage to other offerors. See COS/MOL at 12. The protester argues, generally, that a "competitor could use information on weaknesses identified by the Agency in LVI's technical and small business subcontracting requirements to adjust elements of its own proposal." Protester's Comments, Mar. 30, 2020, at 12. Aside from this general argument, however, the protester does not explain how knowledge of these three non-price issues could have conferred a competitive advantage to another offeror.

The discussions letter identified two technical deficiencies associated with the protester's proposed [DELETED], but does not identify the proposed individuals or explain what aspects of the PWS experience requirement were lacking. AR, Tab 3, LVI Discussions Letter at 2. For the past performance information, the letter noted that two of the protester's references fell short of the stated subcontracting goal. *Id.* For the font

issue, the agency noted that certain pages of the proposal did not comply with the RFP requirements. *Id.*

On this record, in the absence of any specific arguments by the protester as to why this information could have conferred a competitive advantage to another offeror, we find no basis to conclude that the protester was competitively prejudiced or that the agency was required to mitigate the disclosure.

With regard to the price information, the Marine Corps acknowledges that the disclosure of LVI's price affected the competition. See COS/MOL at 11; AR, Tab 7, D&F at 2. The agency argues, however, that changes to the 2020 RFP mitigated the harm associated with the disclosure of the protester's price. COS/MOL at 12-13. The agency cites three primary factors that mitigate the competitive harm from the disclosure: (1) changes to the PWS to reflect guidance issued by the Commandant of the Marine Corps concerning inventory management; (2) changes to the contractor's responsibility for inventory losses; and (3) changes to attachment 22, which increased the number of T&M labor categories from three to seven.⁴ *Id.* at 13. We agree that the agency reasonably found these changes mitigated the competitive harm from the disclosure.

Commandant's Inventory Guidance

First, the agency argues that changes to the Marine Corps's inventory guidance mitigates any competitive harm resulting from the release of the protester's price. The guidance issued by the Commandant of the Marine Corps in the fall of 2019 emphasized the need to support financial statement audits of the Marine Corps's business practices. AR, Tab 8, Letter from Commandant of the Marine Corps, Nov. 8, 2019, at 1. The inspection of business practices includes "recording financial transactions correctly," and assessing "whether we have all the equipment on a commander's Consolidated Memorandum Receipt both in our warehouses and in our Information Technology systems." *Id.* Among the standards set by the letter was the following: "Asset Accountability. Supplies, Equipment, and Real Property will have a pass rate of 99% or greater. If asset records are not current or accurate, the organization should immediately conduct a wall-to-wall inventory." *Id.*

The 2019 and 2020 versions of the RFP require the contractor to conduct inventories of all controlled and non-controlled items in the CSP. 2019 RFP, PWS at 37 ¶ 3.3.5; 2020 RFP, PWS at 39-40 ¶ 3.3.5.1. The Marine Corps states that the 2019 RFP did not meet the requirements of the guidance regarding inventory accuracy, which prompted revisions to the PWS in the 2020 RFP. COS/MOL at 5.

⁴ The Marine Corps also notes that the 2020 RFP was amended at the protester's request to require offerors to "certify that they did not rely on any proprietary information, other than their own proprietary information in developing their proposal." COS/MOL at 7, 12; 2020 RFP at 114.

The 2019 PWS stated that “[t]he [Department of Defense] and Marine Corps inventory accuracy standard is 98%. . . . The 98% standard is based on inventory results at each site listed in attachments 1A and 1B. It is not an average of all CSP sites.” 2019 RFP, PWS at 37 ¶ 3.3.5. The 2020 RFP contains a revised PWS that requires the following “minimal acceptable levels for inventory accuracy,” as follows:

- Controlled items: 100% by [national stock number (NSN)] by [Department of Defense Activity Address Code (DoDAAC)]
- Non-controlled items: 98% by NSN by DoDAAC[.]

2020 RFP, PWS at 41 ¶ 3.3.5.3. The RFP sets forth a list of controlled items in attachment 20 to the RFP. 2020 RFP at 39. In addition, the RFP references Marine Corps guidance, which defines controlled items as follows: “Those items designated as having characteristics that require that they be identified, accounted for, secured, segregated, or handled in a special manner to ensure their safeguard or integrity. Controlled items normally fall into the category of classified, sensitive, and/or pilferable and thus require more stringent inventory controls.” Marine Corps Order (MCO) 4400.201, Glossary, www.marines.mil/Portals/59/Publications/MCO%204400.201%20Glossary_Final.pdf (last visited May 21, 2020).

In addition to the revision concerning controlled items, the 2019 version of the PWS required 98 percent accuracy of all items by site, while the 2020 version of the PWS requires a more exacting standard of 100 percent accuracy for each controlled NSN item at each site, and 98 percent accuracy for each non-controlled NSN item at each site. COS/MOL at 5; see 2019 RFP, PWS at 37 ¶ 3.3.5; 2020 RFP, PWS at 41 ¶ 3.3.5.3. Based on these factors, the agency contends that the 2020 RFP contains material revisions that adequately remedied the disclosure of the protester’s price to Offeror 2. COS/MOL at 12-13; Agency Response to Protester’s Comments, Apr. 7, 2020, at 3. Additionally, the agency notes that the 8-month base period for the 2020 RFP reduces the amount of time the contractor will have to perform the initial inventory. *Id.* at 12. Further, the 2020 RFP requires offerors to submit a physical inventory control plan for evaluation, in contrast to the 2019 RFP, which did not require the submission of this plan for pre-award evaluation. *Id.* at 11.

LVI acknowledges that the PWS revised the requirements for inventory accuracy, but contends that the change was not sufficient to address the competitive harm arising from the disclosure of its information. Protester’s Comments, Mar. 30, 2020, at 8-9. The protester notes, for example, that the change in inventory accuracy from 98 to 100 percent affects only the controlled items, which are 675 of the 30,571,051 items identified in the PWS. *Id.* at 9 (*citing* 2020 RFP, PWS at 40 ¶ 3.3.5).

We think the agency reasonably concluded that the increase in the inventory accuracy requirements was a material change to the terms of the solicitation. The record shows that the 2020 RFP increases the accuracy requirement to 100 percent for controlled items, which requires a higher degree of control and accountability. The record also

shows that the 2020 RFP changes the metric for inventory accountability, from a standard in the 2019 RFP that counted the total number of items at a site, to an NSN-based standard with a higher degree of accuracy. See 2019 RFP, PWS at 37 ¶ 3.3.5; 2020 RFP, PWS at 41 ¶ 3.3.5.3. Additionally, the 2020 RFP reduces the time allowed for performance of the base period requirements, and requires offerors to submit a physical inventory control plan that was not required in proposals under the 2019 RFP. 2020 RFP at 22, 118, 125. We find no basis to conclude that the protester's disagreement with the agency's judgment regarding the materiality of these PWS revisions provides a basis to sustain the protest. See *S&K Aerospace, LLC, supra* at 9-10.

Inventory Losses

Next, the Marine Corps contends that the 2020 RFP modifies the basis upon which offerors must price liability requirements. The 2020 RFP included the following new PWS provision concerning the liability of the contractor for inventory accuracy:

If culpability or neglect exists on the part of the Contractor, the Contractor may be held liable financially for the loss to the Government. This will be determined by the [contracting officer]. After the initial inventory of a CSP managed item to ensure the book to floor is accurate, the Contractor shall maintain the above minimum acceptable levels for inventory accuracy or be held liable financially for loss or damage beyond normal wear and tear to the Government per MCO 4400.203. In the case of loss or damage beyond normal wear and tear, the [contracting officer] will determine the amount of the Contractor's liability.

2020 RFP, PWS at 41 ¶ 3.3.5.3. The agency contends that this new provision requires offerors to price the risks of liability for defects in inventory accuracy. COS/MOL at 5.

LVI argues that the new provision does not affect offerors' pricing because the 2019 RFP already contained two provisions that imposed liability on the contractor. Protester's Comments, Mar. 30, 2020, at 10. The protester notes that section 3.14 of the PWS, which was not revised in the 2020 RFP, contained a provision addressing "Financial Liability Investigation of Property Loss (FLIPL) documentation," which requires the contractor to "maintain accountability of FLIPL documentation." This provision further states that "[i]f culpability or neglect exists on the part of the Contractor, the Contractor may be held liable financially for the loss to the Government." 2020 RFP, PWS at 47 ¶ 3.14. The FLIPL provision of PWS paragraph 3.14, however, addresses the requirement to ensure that "[c]ustomers with missing or damaged equipment, without regard to fault, . . . complete applicable forms in accordance with Attachment 2 (MCO 4400.201) to clear the issue record or to be issued replacement equipment." 2020 RFP, PWS at 47 ¶ 3.14. The FLIPL requirement concerning the return of equipment by customers is different from the contractor's obligations concerning inventory accuracy set forth in PWS paragraph 3.3.5.3. See 2020 RFP, PWS at 41 ¶ 3.3.5.3. The protester does not explain why a liability provision in connection with a PWS provision concerning the completion of forms imposes the same

liability requirements for levels of inventory accuracy imposed by PWS paragraph 3.3.5.3.

LVI also argues that the PWS inventory loss provision is not a new requirement because the RFP already incorporated FAR clause 52.245-1, Government Property, which provides that “the Contractor shall not be liable for loss of Government property furnished or acquired under this contract, *except when any one of the following applies:* (ii) [l]oss of Government property that is *the result of willful misconduct or lack of good faith* on the part of the Contractor’s managerial personnel.” Protester’s Comments, Mar. 30, 2020, at 10 (*quoting* FAR clause 52.245-1(h)) (emphasis added). The revised provision in PWS paragraph 3.3.5.3, however, does not limit the contractor’s liability to instances of willful misconduct or lack of good faith. 2020 RFP, PWS at 41 ¶ 3.3.5.3 (contractor may be held financially responsible for culpability, neglect, and loss or damage beyond normal wear and tear). On this record, we find no merit to the protester’s argument that the 2019 RFP contained the same liability provisions as those added to the 2020 RFP.

Increase in T&M Labor Categories

Finally, the Marine Corps argues that the increase in the number of T&M labor categories is a material change to the RFP’s requirements which mitigates any competitive harm to the release of the protester’s price. The protester contends that the revision to RFP attachment 22, which increased the number of T&M labor categories from three to seven, was not material because “[t]he 2020 RFP offers no guidance on how the Agency would use the time and materials labor rates provided by an offeror as part of its evaluation.” Protester’s Comments, Mar. 30, 2020, at 11. As discussed in the next section below, however, attachment 22 requires the information upon which offerors’ prices are calculated, and the revised version of attachment 22 in the 2020 RFP clearly requires offerors to propose prices for the T&M CLINs on a different basis than the version of that attachment in the 2019 RFP. Offerors will necessarily be required to revise their approach to pricing these CLINs because they will be using seven, rather than three labor rates. As a natural consequence, the agency will evaluate offerors’ prices based on the changes required by the new approach to pricing. On this record, we find no merit to the protester’s contention that the change to RFP attachment 22 was not material.

Accordingly, we also find that the agency reasonably concluded these changes mitigated the competitive harm from the disclosure of LVI’s information in the discussions letter. *See S&K Aerospace, LLC, supra* at 8-10.

Alleged Disclosure of LVI Proposal Information

Next, LVI argues that the Marine Corps improperly disclosed information from its proposal to offerors through the revised terms of the 2020 RFP. The 2019 and 2020 versions of the RFP contain attachment 22, which is a Microsoft Excel spreadsheet with two tabs. 2019 RFP, attach. 22; 2020 RFP, attach. 22. The first tab contains a list of all

CLINs, and requires offerors to propose prices for the fixed-price CLINs, and contains a not-to-exceed price for the T&M CLINs; the second tab lists labor categories to price the labor hour rates for the T&M CLINs and uses formulas to calculate the labor subtotal prices for those CLINs. *Id.* The attachment provides fixed hours for each labor category at different performance locations, and offerors are required to propose hourly rates for each labor category. *Id.*

The 2019 RFP listed three labor categories for the T&M CLINs on the second tab of attachment 22: (1) logistics specialist, (2) site manager, and (3) warehouse specialist. 2019 RFP, attach. 22, Tab 2. The Marine Corps explains that it initially prepared the T&M labor categories in attachment 22 by reviewing a list of 19 labor categories identified by the staff of the head of the contracting activity. COS/MOL at 6. Rather than use the entire list of 19 categories, however, the business manager for the CSP recommended only the three listed in the 2019 RFP. *Id.*

LVI's proposal in response to the 2019 RFP provided the rates required for these positions. LVI 2019 Price Proposal at 9. The narrative for the protester's price proposal explained that for the logistics specialist category, it had proposed a "[DELETED]." *Id.* at 6.

Following the cancellation of the 2019 RFP, the agency revised the labor categories for attachment 22. The new version of attachment 22 removes the logistics specialist labor category, and adds five new labor categories, for a total of seven: (1) inventory specialist, (2) site manager, (3) warehouse specialist, (4) store worker I, (5) forklift operator, (6) order filler, and (7) material handler laborer. 2020 RFP, attach. 22, Tab 2.

LVI argues that the Marine Corps improperly disclosed its proprietary information in the revised version of attachment 22 because [DELETED] of the five new labor categories are those identified by the protester as [DELETED] for the logistics specialist labor category. Specifically, the protester alleges that the agency "adopted [DELETED] labor categories – [DELETED] – directly from LVI's 2019 proposal." Protester's Comments, Mar. 30, 2020, at 5. The protester contends that other offerors would assume that the changes to the labor categories in attachment 22 were based on information from the protester's proposal, because of its status as a current subcontractor to the incumbent contractor, and a former prime contractor. Protester's Response to GAO Questions, May 15, 2020, at 11. For these reasons, the protester argues that it was prejudiced because other offerors would know how it prepared its prices for the T&M CLINs. *Id.*; Protester's Supp. Comments, May 19, 2020, at 2.

The Marine Corps denies that the revisions to attachment 22 in the 2020 RFP were based on LVI's proposal. COS/MOL at 6. The agency's response to the protester's pre-protest letters concerning the revised RFP stated that "[t]he Agency did not look at or use LVI's proposal submitted in 2019 to prepare Attachment 22." Protest, attach. 3, Letter from Agency to Protester, Feb. 12, 2020, at 2. Similarly, the agency's response to the protest states that the "Chief of OCS in the Contracts Department wrote revisions to the 2020 RFP Attachment 22," and further states that this individual "did not look at or

use LVI's 2019 proposal to prepare the Attachment 22 for the 2020 RFP." COS/MOL at 6-7.

LVI argues that the Marine Corps's representations are not supported by the record because, although three of the five new labor categories were part of the 19 initially identified by the agency, the other two were not. Protester's Comments, Mar. 30, 2020, at 4-5. Specifically, neither the forklift operator nor the store clerk I labor categories were included in the list of 19 labor categories. See AR, Tab 11, Recommended Labor Categories, Tab 2.

The Marine Corps states that the forklift category was added to the T&M requirements because the material handler labor category did not encompass the qualifications necessary to operate a forklift. COS/MOL at 7. The agency explains that the chief of OCS relied on the SCA definition of the material handler labor category, which excluded the qualifications of a forklift operator. *Id.* For the store worker I labor category, the agency acknowledges that the list of 19 categories initially proposed by agency personnel included a "store worker" category, rather than a "store worker I" category. Agency Response to Protester's Comments, Apr. 7, 2020, at 3. As the agency notes, however, store worker I is not a proprietary title developed by the protester, but rather an SCA labor category. *Id.*

In sum, the Marine Corps represents that the revisions to attachment 22 in the 2020 RFP were made without reference to the protester's proposal. We find no basis in the record to conclude that the protester's challenge to the agency's representations have merit.

Disclosures in the 2018 RFI

Next, LVI argues that the Marine Corps improperly disclosed information in June 2018 in connection with the RFI issued as part of the agency's market research for the 2019 RFP. Protest at 11; COS/MOL at 7. LVI advised the agency through phone calls and correspondence that it believed that the RFI contained the following proprietary information concerning its performance of the CSP requirements: (1) two cost items, which the protester argued could be used to calculate its wrap rate, *i.e.*, its combined indirect cost and profit rates; (2) the names of certain LVI personnel; and (3) a list of equipment used or owned by LVI. Protest, attach. 8, Letter from LVI to Agency, June 29, 2018, at 1-4.

The Marine Corps acknowledges that it "inadvertently released LVI proprietary information" in connection with the RFI. COS/MOL at 7. In response to LVI's concerns regarding the disclosure, the agency advised that it would rescind the RFI and follow a "new acquisition strategy for the requirement." AR, Tab 15, Letter from Agency to LVI, July 18, 2018, at 1. The agency further stated that it would not use the data identified by the protester in future RFI releases, and that the agency would "conduct thorough checks before publishing information to preclude any future concerns." *Id.* The agency concluded that "[w]ith these alleviating steps, the concerns raised are mitigated." *Id.*

On July 24, LVI responded to the Marine Corps's letter to express the concern that the agency's actions "cannot completely mitigate the risk that LVI proprietary information initially released as part of the RFI will not be used by a competitor in a future procurement." AR, Tab 16, Letter from LVI to Agency, July 24, 2018, at 1. The protester requested that the agency consider "assigning a lesser weight to an offeror[']s price in a future procurement for the [RFP's] requirements, as a means to further mitigate the impact of the release of LVI proprietary information." *Id.*

The Marine Corps states that it agreed with LVI's request, and issued the 2019 RFP with evaluation criteria that assigned lesser weight to the price factor as compared to what had been contemplated by the RFI. COS/MOL at 7-8. The agency notes that when it issued the 2019 RFP in May 2019, it did not receive a protest regarding the release of LVI's information. *Id.* at 8.

Despite the fact that the protester did not raise any concerns regarding the 2018 disclosure in connection with the final issuance of the 2019 version of the RFP, the protester contends that the Marine Corps's disclosure of information in the 2018 RFI "continue[s] to be relevant to performance of the CSP requirements in the 2020 RFP." Protester's Comments, Mar. 30, 2020, at 6. The protester further contends that the agency was obligated to consider the "cumulative" effect of the 2018 disclosure when issuing the 2020 revision of the RFP. *Id.* at 20 n.3. We conclude that the protester's arguments are untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Although LVI argues that the 2018 disclosure continues to cause it competitive disadvantage in connection with the 2020 RFP, the protester does not explain why it did not file a protest regarding this disadvantage in connection with the 2019 RFP. Prior to the issuance of the 2019 RFP, the protester requested that the agency pursue an acquisition strategy that reduced the importance of price in the source selection process, and the agency agreed to this request. COS/MOL at 7-8. After this exchange, however, the protester did not raise any additional concerns--in particular, the protester did not challenge the 2019 RFP after it was issued.

As noted above, a significant purpose of our timeliness rules is to avoid undue delay to agency procurements. See *Verizon Wireless*, *supra*. Because the protester did not challenge the terms of the 2019 RFP, we therefore find no basis to conclude that the protester is timely to argue that the agency was obligated to address the 2018

disclosure through amendment of the 2019 RFP via the 2020 RFP.⁵ See 4 C.F.R. § 21.2(a)(1).

In sum, we think the agency reasonably concluded that the revised terms of the 2020 RFP adequately mitigated the disclosures of LVI's information during the competition under the 2019 RFP. We also find no basis to conclude that the agency disclosed the protester's T&M labor rates, or that the protester is timely to challenge the 2018 disclosures. We therefore find no basis to sustain the protest.

Procurement Integrity Act

LVI argues that the Marine Corps's disclosure of its proprietary information to Offeror 2 during discussions in connection with the competition under the 2019 RFP violated the PIA, and that the agency unreasonably concluded that a violation had not occurred. Protester's Comments, Mar. 13, 2020, at 13. The protester also argues that the disclosure of LVI's proposed labor categories in attachment 22 violated the PIA. *Id.* at 14. The protester further contends that the agency failed to conduct an adequate investigation of the potential violation under the provisions of FAR 3.104. *Id.* at 15. For the reasons discussed below, we find no basis to sustain the protest.

The PIA provides, among other things, that except as provided by law, a person shall not knowingly disclose or obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. 41 U.S.C. § 2102. The FAR states that a contracting officer who receives or obtains information of a violation or possible violation of the PIA must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor. FAR 3.104-7(a). If the contracting officer determines that there is no impact on the procurement, he or she must forward the information concerning the violation or possible violation, along with documentation supporting the determination that there is no impact on the procurement, to an individual designated in accordance with agency procedures. *Id.* 3.104-7(a)(1). If that individual agrees with the contracting officer's analysis, the procurement may proceed. *Id.* 3.104-7(a)(1)(i).

⁵ In any event, LVI does not clearly explain how information from the 2018 RFI creates competitive prejudice in connection with the 2020 RFP. For example, the protester argues that, although the disclosed cost information did not identify which labor categories were used for billing, offerors could infer that the following cost entry, "4 Temps 10 Days [Defense Property Accountability System] Backlog," implies a specific labor category. Protest at 11; Protest, attach. 8, Letter from LVI to Agency, June 29, 2018, at 2. If offerors correctly infer the correct labor category, the protester argues that offerors could use the applicable SCA wage to calculate LVI's overall wrap rate. The protester, however, does not explain how offerors could know that a single labor rate was used in the cost entry, or which labor rate--out of the 12 cited in the wage determination--was used. See *id.* (stating that "[g]iven the nature of the work (temporary help) one easily can select 21071-Order Filler").

With regard to the discussions letter, the contracting officer for the 2019 RFP found that the disclosure of LVI's discussions letter to Offeror 2 did not result in a violation of the PIA. COS/MOL at 4, 14. The contracting officer interviewed the contract specialist who sent the letter via email, and the chief of OCS, who was with the contract specialist at the time the letter was sent. COS/MOL at 4; AR, Tab 7, D&F at 1. Based on these conversations, the contracting officer determined that an inadvertent error occurred during the naming of the files for transmission to the offerors. *Id.* The contracting officer concluded that the PIA was not violated because the transmission of the letter to Offeror 2 was not the result of a knowing disclosure. COS/MOL at 4.

With regard to the labor categories in the revised version of attachment 22, the agency states, as discussed above, that it did not add new labor categories based on information in the protester's proposal. COS/MOL at 6-7; Protest, attach. 3, Letter from Agency to Protester, Feb. 12, 2020, at 2. For this reason, the agency contends that there was no knowing disclosure of the protester's information. *See id.*

Our Office has explained that the PIA prohibits government officials from "knowingly" disclosing bid or proposal information. *S&K Aerospace, LLC, supra* at 6; 41 U.S.C. § 2102(a)(1). We have found, therefore, that where a disclosure is inadvertent or unintentional, a contracting officer may reasonably conclude that there was no violation of the PIA. *See id.* at 6.

LVI does not specifically dispute the Marine Corps's finding that the disclosure of the discussions letter was unintentional; consequently the protester does not establish that this disclosure violated the PIA's prohibition on knowingly disclosing contractor bid or proposal information. With regard to the revision of attachment 22, the protester argues that the agency specifically relied on information in its proposal in response to the 2019 RFP--which would constitute a knowing disclosure. As discussed above, however, we find that the protester does not show that the agency's representations that the revisions were not based on the protester's proposal are untrue. Because the protester does not establish that the alleged violations of the PIA were based on a knowing disclosure by the agency, we find no basis to conclude that the agency's conclusions regarding the PIA were unreasonable.⁶ We therefore find no basis to sustain the protest.

⁶ LVI also argues that the Marine Corps's PIA investigation did not follow all of the procedural requirements of FAR subpart 3.1. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f); *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. Because the protester does not establish that the prerequisite elements of a PIA violation are present--*i.e.*, the knowing disclosure of contractor bid or proposal information, we find that this argument fails to state a valid basis of protest and dismiss the allegation accordingly. *See* 4 C.F.R. § 21.5(f).

Organizational Conflicts of Interest

LVI argues that although the 2019 and 2020 versions of the RFP prohibit offerors from proposing certain firms as subcontractors due to their role supporting the CSP contract based on potential OCIs, the solicitation improperly fails to also prohibit offerors from hiring employees of those firms. Supp. Protest at 3-6. For the reasons discussed below, we find no basis to sustain the protest.

The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR 9.505(b), 9.505-4; *Cyberdata Techs., Inc.*, B-411070 *et al.*, May 1, 2015, 2015 CPD ¶ 150 at 6. The concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of "[p]roprietary information that was obtained from a Government official without proper authorization," or "[s]ource selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." FAR 9.505(b); see *ITT Corp.--Elec. Sys.*, B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 5.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see also *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. We review OCI investigations for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's absent clear evidence that the agency's conclusion is unreasonable. *TISTA Sci. & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6.

The 2020 RFP states that the CSP program is supported by technical service contractors who may be involved in the acquisition process for the solicitation and the administration of the resulting contract. 2020 RFP at 116. The solicitation identifies specific firms who may have OCIs arising from their roles as support contractors, and states that these firms are prohibited from proposing as prime or subcontractors. *Id.* The RFP further advises that the successful contractor may not employ individuals or

firms who are “actively involved” in the administration of CSP without an “acceptable OCI plan.” *Id.* (emphasis added).⁷

Amendment 001 to the 2020 RFP includes the following question and answer (Q&A) concerning the hiring of individuals who work on one of the CSP technical support contracts:⁸

3. If a candidate currently working in California, North Carolina or [outside the contiguous United States] on the CSP Technical Support Services contract applies for a position with an offeror’s company, but has not been involved in the development of this opportunity, may we consider that person’s application for employment?

Answer: Yes, provided there is an acceptable Organizational Conflict of Interest plan that is submitted with the proposal that mitigates any individual’s conflict.

AR, Tab 19, 2020 RFP amend. 0001, Q&As, at 1 (emphasis omitted). The agency addressed an additional question about this matter in amendment 002 to the 2020 RFP:

11. Regarding Q&A number 3: The government prohibits the current technical assist contractor from participating in bidding because of their relationship with requirements determination and oversight of the CSP operations contract. Field representatives of the technical services contract have unlimited access to Proprietary information such as methods, work instructions, personnel rosters, equipment lists, names, and other information of the incumbent.

Question: How does the government expect to protect proprietary information if it allows Incumbent employees to become managers of proposing organization or proposing competitors? Clearly a competitor is already planning to propose individuals who are in those oversight [roles]. One would expect they have a contractual relationship with an individual that they propose to bid. Individuals with a contingent offer to become a regional manager are likely already providing information to a competitor. How does an OCI plan protect transmission and use of Proprietary information?

⁷ The 2019 RFP contained a similar provision that did not identify specific firms. See 2019 RFP at 120.

⁸ The CSP technical support contracts are distinct from the CSP operations contract, which is the subject of this protest.

Answer: The OCI plan and an executed [nondisclosure agreement (NDA)] is a method to safeguard against transmission and use of proprietary information. Enforcement for violations is determined by the Contracting Officer.

AR, Tab 21, 2020 RFP amend. 0002, Q&As, at 3 (emphasis omitted).⁹

LVI argues the RFP improperly allows the awardee of the contract to hire employees of firms performing the CSP technical support contracts. Protester's Comments, Mar. 30, 2020, at 24. The protester contends that such individuals "would have access to LVI proprietary information as part of the performance of their duties," which "could provide an offeror competing against LVI in response to the 2020 RFP with a competitive advantage in the procurement." *Id.* The protester notes that although the Marine Corps acknowledges potential OCIs relating to the firms, the agency has improperly failed to address the OCIs relating to the employees of such firms. *Id.* The protester therefore characterizes the agency's decision not to affirmatively prohibit the hiring of any individual who worked for a CSP support contractor as "approval" of such hires. Protester's Supp. Comments, Apr. 13, 2020, at 6.

The Marine Corps disputes LVI's assertion that it has affirmatively approved or permitted any specific hires by offerors. See COS/MOL at 16-17. Instead, the agency states that the RFP and two rounds of Q&As set forth requirements for avoiding OCIs associated with specific contractors or individuals, particularly those firms that perform the CSP technical support contracts. *Id.* at 16. We agree with the Marine Corps that the RFP does not expressly approve the hiring of any particular individual, nor has the agency given unconditional approval for the hiring of individuals who have worked on the CSP support contracts. Instead, as discussed above, the RFP and Q&As require that an offeror that intends to employ such individuals must address potential OCIs in their proposals. 2020 RFP at 116; AR, Tab 19, 2020 RFP amend. 0001, Q&As, at 1; Tab 21, 2020 RFP Amend. 0002, Q&As, at 3. The RFP and Q&A's further provide that the agency will evaluate the offeror's OCI mitigation plan. *Id.*

On this record, we find no basis to conclude that the agency failed to give meaningful consideration to potential OCIs arising from the hiring of individuals that the protester contends could give rise to an unequal access to information conflict. We therefore find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁹ We note that while this Q&A alleges that a competitor is planning to hire individuals who have performed on the CSP support contracts, LVI has not specifically identified any individuals or firms whose actions give rise to OCIs.